

## REMARKS

Claims 1-8, 11-21, 23, 24, 27, and 28 are presently pending. Claims 9, 10, 22, 25, and 26 were previously cancelled. Claims 14-21 were previously withdrawn. Reconsideration of presently pending claims 1-8, 11-13, 23, 24, 27, and 28 is respectfully requested in light of the following remarks.

### Rejections under 35 U.S.C. §103

#### *Young in view of Maroney*

Claims 1-8, 11, 12, and 22-27 stand rejected under 35 U.S.C. §103(a) as being unpatentable over U.S. Patent No. 6,190,414 to Young et al. (“Young”) in view of U.S. Patent No. 6,277,123 to Maroney et al. (“Maroney”). The PTO provides in MPEP § 2143

To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations.

With respect to independent claim 1, to sustain this rejection, Young in combination with Maroney must teach all of the claim limitations. Young fails to teach at least three of the elements of claim 1.

First, Young does not teach, “a set of gears connected to the proximal end of the axle.” The Examiner has identified “telescopic jack mechanism” 138 as corresponding to the claimed set of gears, but telescopic jack mechanism which “incorporates telescopic jack screw 140 and rotatable component 142” (col. 5, lines 19-21) is simply not a set of *gears*. Maroney does not appear to remedy this deficiency.

Second, Young does not teach, an engager device to rotate the tubular body of the implant assembly when the axle is rotated. The Examiner has identified “spur gear” 136 as corresponding to the claimed engager device, “elongated portion” 108 as corresponding to tubular body, and “shaft” 120 as corresponding to the claimed axle. Clearly, as shown in FIG. 4

of Young, the spur gear 136 does not operate to rotate the elongated portion 108 when the shaft 120 is rotated. Maroney does not appear to remedy this deficiency.

Third, as the Examiner has acknowledged, Young does not disclose a pair of movable arc portions to at least partially surround the tubular body of the implant assembly as the tubular body is rotated within the surrounding arc portions by the engager device. Maroney does not remedy this deficiency. The Examiner cites “jaws” 21 as corresponding to the claimed arc portions. As Maroney describes, jaws 21 form a clamp 20 and “clamp 20 is secured to the shaft of the humerus” (col. 4, lines 20-25). Notably, the cited jaws 21 surround *bone*, not a tubular body of an implant assembly. Furthermore, the jaws 21 *secure* to the bone. They do not at least partially surround a rotating tubular body of an implant assembly. In fact, the clamping device of Maroney is intended to permit *no* rotation of the bone it surrounds. Thus, even when combined, Maroney and Young do not teach the claimed subject matter. Furthermore, Maroney teaches away from claimed invention by instructing the use of a device that securely clamps bone rather than permitting rotation of a surrounded implant. Further teaching away from the claimed invention, Maroney teaches the use of an entirely nonanalogous clamp 50 for securing to the implant or prosthesis 60.

Thus, the Examiner’s burden of factually supporting a *prima facie* case of obviousness cannot be met, and for at least the reasons cited above, independent claim 1 appears to be allowable over Young in view of Maroney. Dependent claims 2-8 and 11-13 depend from and further limit claim 1 and so also appear to be in condition for allowance.

*Young in view of Maroney and Keller*

Dependent claim 13 is rejected under 35 U.S.C 103(a) as being unpatentable over Young and Maroney and further in view of U.S. Patent Pub. No. 2003/0229355 to Keller (“Keller”). The present application claims priority to U.S. Provisional Application No. 60/412,730 filed on September 23, 2002 which fully supports the pending claims. As such, the Keller reference, filed February 5, 2003, is not prior art to the present application, and the rejection as to claim 13 should be withdrawn. Since the cited reference is improper, no comment is being made as to its relevance.

**Claim 28**

The Office Action does not appear to address claim 28 which recites at least the following combination of elements not found in the Young, Maroney, and Keller references:

a toothed section fixedly attached and coaxially aligned with the second gear, the toothed section including a plurality of radially spaced teeth,

wherein the radially spaced teeth are adapted to rotatably engage a tubular body portion of the vertebral implant bounded between a pair of endplates, and

wherein the rotation of the axle is adapted to rotate the tubular body relative to the pair of endplates.

Claims 23, 24, and 27 depend from and further limit claim 28 and, therefore, also appear to be in condition for allowance.

**Conclusion**

It is clear from all of the foregoing that claims 1-8, 11-13, 23, 24, 27, and 28 are in condition for allowance. Should the Examiner deem any amendments necessary to place this application in condition for allowance, the Applicant welcomes the Examiner to contact the undersigned at the below listed telephone number.

No fees, including extension of time fees, are believed necessary for consideration of the present paper. However, if any fees, including extension of time fees, are necessary, the extension of time is hereby requested, and the Commissioner is hereby authorized to charge any fees, including those for the extension of time, to Haynes and Boone, LLP's Deposit Account No. 08-1394.

Respectfully submitted,

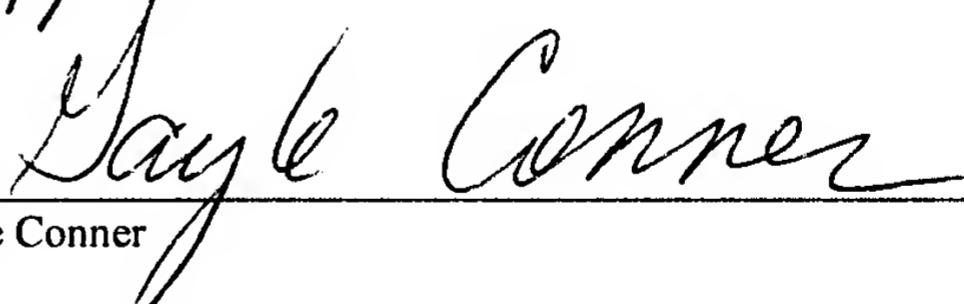


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